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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MAYNARD N. LONDON,

Petitioner

vs.

MANHATTAN LIFE CORPORATION, et. al.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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June 18, 1985

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QUESTIONS PRESENTED

1. Whether the Courts below erred in deciding and affirming that on a Motion for Summary Judgment, the District Court could determine the significance of the similarities between Petitioner's idea and Respondent's plan and thereby deny Petitioner his right to have this matter determined by a jury of his peers pursuant to the Seventh Amendment of the United States Constitution.

INDEX

TABLE OF CONTENTS

Opinion Below 2

Jurisdiction 2

Questions Presented 3

Statutory Provisions Involved 3

Statement of Case 4

Reasons for Granting the Writ 8

I. The lower Courts erroneously granted and affirmed Summary Judgment in the instant case and denied Petitioner his Seventh Amendment right.

Conclusion 15

Appendix 18

TABLE OF CITATIONS

Arnstein v. Porter, 154 F.2d 464 (2nd Cir., 1946) 13, 15

Belt v. Hamilton Nat'l Bank, 108 F.Supp. 689 (D.C. D.C. 1952), aff'd 210 F.2d 706 (D.C. Cir., 1953) 13

Bergman v. Electrolux Corp., 558 F.Supp. 1351 (D. Nev. 1983) 9, 13

Capital Films Corporation v. Charles Fries Productions, Inc., 628 F.2d 387 (5th Cir., 1980) 8

Ed Graham Productions, Inc., 337 N.Y 2d 766 (1973) 9, 11

Freedman v. Beneficial Corp., 406 F.Supp. 917 (D. Del. 1975) 11

Galanis v. Proctor and Gamble Corporation, 153 F.Supp. 34 (S.D. N.Y. 1957) 8

Official Airlines Schedule Information Services, Inc. v. Eastern Airlines, 333 F.2d 672 (5th Cir. 1964) 8

Reyher v. Children's Television Workshop, 377 F.Supp. 411 (S.D.N.Y. 1974) 13, 15

Vantage Point v. Parker Brothers, Inc., 529 F.Supp. 1204 (S.D.N.Y. 1981); aff'd 697 F.2d 301 (2nd Cir. 1982) 9

INDEX

TABLE OF CONTENTS

Opinion Below 2

Jurisdiction 2

Questions Presented 3

Statutory Provisions Involved 3

Statement of Case 4

Reasons for Granting the Writ 8

I. The lower Courts erroneously granted and affirmed Summary Judgment in the instant case and denied Petitioner his Seventh Amendment right.

Conclusion 15

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Petitioner, Maynard M. London, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 20, 1985.

OPINION BELOW

The Opinion of the Court of Appeals, unpublished, appears in the appendix hereto. The Opinion of the United States District Court of the District of Maryland, unreported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 20, 1985. This Petition for Certiorari was filed within ninety (90) days of the entry of judgment by the United States Court of Appeals for the Fourth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

The parties below are Maynard N. London, Petitioner; and the Manhattan Life Corporation, a Delaware Corporation; the Manhattan Life Insurance Company, a wholly owned subsidiary of the Manhattan Life Corporation, a Delaware Corporation; Donald M. Fordyce, Chairman of

the Board, Chief Executive Officer of Manhattan Life Corporation, and the Manhattan Life Insurance Company, individually, and in his corporate capacity, Respondents.

QUESTIONS PRESENTED

1. Whether the Courts below erred in deciding and affirming that on a Motion for Summary Judgment, the District Court could determine the significance of the similarities between Petitioner's idea and Respondent's plan and thereby deny Petitioner his right to have this matter determined by a jury of his peers pursuant to the Seventh Amendment of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Seventh Amendment, United States Constitution:

> In suits at common law where the value in controversy shall exceed $20.00, the right of trial of jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. 1332, because of diversity of citizenship, the Plaintiff being a citizen of Maryland and the Defendants citizens of Delaware and New York. Additionally, the amount in controversy, exclusive of interest and costs, exceeds $10,000.

Petitioner, Maynard L. London, developed a unique plan for the life insurance industry by which physically fit individuals would receive credit points, based upon certain criteria to establish physical fitness, and reward those physically fit individuals with a higher dividend at the end of each year. This concept differed significantly from past practices in the insurance industry wherein differing medical infirmities would give rise to a debit and result in higher premiums.

Petitioner solidified his concept and

entitled it, "The Long Life and Good Health Plan." Prior to marketing his proposal, Petitioner consulted an attorney who advised that a copy of the proposal be sealed and that Mr. London mail a copy to himself in the event that there was a question as to when the idea was developed and its confidentiality. In late 1963, Petitioner began to market his proposal. He met with various representatives of several insurance companies, and before each meeting, informed each representative that the meeting was to be held on a confidential basis and upon acceptance, he would receive 5% of the gross premiums received. In late 1967, to early 1968, Respondent, Donald Fordyce contracted Mr. London to discuss his idea. In March, 1968, Mr. London met with Mr. Fordyce, Mr. Lohm, and Mr. Dezube, at Respondent Manhattan Life's offices. At that meeting, Mr. London again explained that the idea was

being presented in confidence and if used, Mr. London would be compensated. After some discussion, the meeting ended on an indefinite note.

In 1973, Respondent, Donald Fordyce became the President of Manhattan Life Insurance Company and in 1978, became the Chairman of the Board and Chief Executive Officer. In October, 1980, Manhattan Life Insurance Company introduced a unique policy known as "Lifestyle 2000." Former President of Manhattan Life confirmed that "Lifestyle 2000" was a new concept within the industry, in that it provided credits as opposed to the traditional method of only providing debits. "Lifestyle 2000" was the first policy within the life insurance industry which used credits in evaluating risks.

However, Respondents contend that "Lifestyle 2000" was the creation of Dr. Kenneth Cooper of Cooper Clinic in Dallas,

Texas. Dr. Cooper, in 1977, met with Respondent Fordyce and the then President of Respondent, Manhattan Life, Franklin Maisano, who discussed the establishment of some type of policy for physically fit individuals. Dr. Cooper had no input on deciding on how to implement the concept and did not assist in the development of the criteria. Respondents contend that Dr. Cooper's concept was solidified by individuals within Manhattan Life Insurance Company and Dr. Brachfeld of Cornell University.

Notwithstanding the foregoing, the U.S. District Court for the District of Maryland (Northrop, J.) granted Respondents Motion for Summary Judgment, without the benefit of argument, and held that "whatever minimal similarities are present are attributable to unoriginal ideas."

On appeal to the U.S. Court of Appeals for Fourth Circuit the Court affirmed and

held that "there was evidence to support those findings," in an unreported opinion.

REASONS FOR GRANTING THE WRIT

1. THE LOWER COURTS ERRONEOUSLY GRANTED AND AFFIRMED SUMMARY JUDGMENT IN THE INSTANT CASE AND DENIED PETITIONER HIS SEVENTH AMENDMENT RIGHT.

In order to constitute the tort of misappropriation of intellectual property, three essential elements are necessary. These are:

1. The idea was novel and concrete;
2. The idea was disclosed in a confidential manner;
3. The idea was adopted and made use of by the Defendant.

Capital Films Corporation v. Charles Fries Productions, Inc., 628 F.2d 387 (5th Cir. 1980); Official Airlines Schedule Information Services, Inc. v. Eastern Airlines, 333 F.2d 672, 673-674 (5th Cir. 1964); Galanis v. Proctor & Gamble Corporation, 153 F.Supp. 34, 38 (S.D.N.Y. 1957). There must be a showing that the Defendant had access

to the idea. Vantage Point v. Parker Brothers, Inc., 529 F.Supp. 1204, 1211-1213 (S.D.N.Y. 1981), aff'd 697 F2d 301 (2nd Cir., 1982). The Plaintiff must demonstrate a substantial similarity between his idea and the use made by the Defendants. Bergman v. Electrolux Corp., 558 F.Supp. 1351, 1353 (D. Nev. 1983).

The United States District Court for the District of Maryland (Northrop, J.), decided to grant Summary Judgment in favor of the Respondents in this matter. The Court determined that based on a comparison of the criteria for determining who was or who was not physically fit were ". . . minimal similarities . . . [which were] attributable to unoriginal ideas, . . ." The Court then granted Summary Judgment based upon the case of Ed Graham Productions, Inc. v. National Broadcasting Company, Inc., 337 N.Y. 2d 766, 768-769 (1973). In Ed Graham, supra, the Court was confronted with a case where Mr. Graham had developed a Saturday morning

cartoon series that he called, "Birdman and Sparrow." From the record, it appeared that Mr. Graham very much enjoyed the Batman character and, at one point, managed to acquire the syndicated rights to the Batman series. Mr. Graham thereafter developed his concept of Birdman and Sparrow. The developmental criteria for Ed Graham's Birdman and Sparrow involved great similarities to the Batman syndication, including being able to fly by which of jet packs, traveling about in a "Birdmobile" and having an alter ego of a rich socialite residing at his stately manor. Subsequent to the presentation of this idea by Mr. Graham, National Broadcasting Company released for Saturday morning cartoons, a character by the name of "Birdman." Unlike Mr. Graham's Birdman, however, National Broadcasting Company's Birdman flew independent of any jet propulsion devices since it was developed from

ancient Egyptian mythology eminating from the power of the Egyptian God Ra. The Court in that case, held that Mr. Graham's concept was not original since there was such a striking similarity to the Batman syndication.

Ed Graham Productions, supra, cannot be hald as authority for showing minimal similarities of unoriginal ideas in the instant matter. Although the Court may have been correct that the criteria used for determining who is physically fit is not original, the concept of providing credit, and, therefore, increasing the dividends to the policyholder was. The District Court's Opinion appears to gloss over this significant similarity between Mr. London's concept and "Lifestyle 2000."

In Freedman v. Beneficial Corporation, 406 F.Supp. 917 (D. Del., 1975), Freedman brought action against Beneficial for misappropriation of his business idea by which

he proposed that the Defendants make loans based upon borrowers' expected Federal income tax refunds, which would then be assigned to the Defendants as a form of collateral security. Additionally, Beneficial was advised to enter into a tax return preparation business. Three years later, after telling Freedman that they were not interested in his idea, Beneficial began to market what circumstantially appeared to be the very same program. The Court (Latchum, C.J.) held that it would be inappropriate to enter Summary Judgment. In the instant case, like that in Freedman, supra, the underlying concept based upon circumstantial evidence, appears the same. The very idea previously given was subsequently utilized.

Pursuant to the Seventh Amendment of the United States Constitution, Respondent London is granted a right to have this dispute determined by a jury of his peers. At a minimum, there is sufficient evidence to

permit this issue to be presented to a jury. As the Court, in Bergman v. Electrolux Corporation, stated, at 1353:

> Novelty pertains to originality or innovation; concreteness means the idea has been sufficiently developed so as to be ready for immediate use without embellishment . . . The imposition of these two requirements insures that the idea merits protection; i.e., it is tangible and would not exist but for the independent efforts of its creator . . . Whether the idea is original and whether it has been developed to a form that is sufficiently definite and concrete are questions of fact for determination by the trier of fact.(emphasis added)

See also Belt v. Hamilton National Bank, 108 F.Supp. 689, 692 (D.C.D.C. 1952), aff'd 210 F.2d 706, 708 (D.C. Cir. 1953).

In Reyher v. Children's Television Workshop, 377 F.Supp. 411, (S.D.N.Y., 1974), the Court based its decision upon Arnstein v. Porter, 154 F.2d 464 (2nd Cir. 1946) and stated:

> It follows that, as credibility is unavoidably involved, a genuine issue

of material facts presents itself. With credibility a vital factor, Plaintiff is entitled to a trial where the jury can observe witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross examining the defendant - the 'crucial test of credibility' - in the presence of the jury. Plaintiff, or a lawyer on his behalf, on such examination, may elicit damaging admissions from the defendant; more important, Plaintiff may persuade the jury, observing Defendant's manner when testifying, the Defendant is unworthy of belief.

To be sure, Plaintiff examines the Defendant on deposition. But that right to use deposition for discovery, or for limited purposes at trial, of course does not mean that they are to supplant the right to call and examine the adverse party, if he is available, before the jury. For the demeanor of witnesses is recognized as a highly useful, even if not infallible, method of ascertaining the truth and accuracy of their narratives. As we have said, 'the deposition has always been and still is, treated as a substitute, a second-best, and not to be used when the original is at hand' for it deprives 'of the advantage of having the witness before the jury'. It has been said that as 'the appearance and manner of the witness' is often 'a complete antidote' to what he testifies, 'we cannot very well overestimate the importance of

> having the witnesses examined and cross examined within the presence of the court and jury' . . .
>
> The right of a party, therefore, to have a witness subjected to the personal view of the jury, is an invaluable right of which you should not be deprived . . . except by necessity. And that necessity ceases whenever the witness is within the power of the court, and may be produced upon the trial.'
>
> With all that in mind, we cannot now say - as we think we must say to sustain a Summary Judgment - that at the close of a trial, the judge could properly direct a verdict.

Both the Courts, in Reyher and Arnstein, both supra, denied Summary Judgment. The District Court, in the instant case, erred in granting Summary Judgment, and the Court of Appeals compounded the error by affirming the lower court.

CONCLUSION

Maynard N. London's idea of crediting individuals for their good health was a new and innovative concept to the insurance industry. This striking similarity between "The Long Life and Good Health Plan" and

"Lifestyle 2000" is sufficient to send to the trier of fact. The Courts below denied Petitioner, Maynard M. London, of his Seventh Amendment right to have these issues tried and determined by a jury of his peers. Petitioner respectfully requests that this Court issue a Writ and summarily reverse the United States Court of Appeals for the Fourth Circuit and direct a remand for trial in this matter.

Respectfully submitted,

Robert A. Rohrbaugh
31 Wood Lane
Rockville, MD 20850

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the aforegoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was mailed, postage prepaid to Sheila J. Carpenter, Esquire, Suite 800, 1666 K Street, N.W., Washington, D.C. 20006 this 18th day of June, 1985.

ROBERT A. ROHRBAUGH

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 84-1496

Maynard N. London Appellant,

versus

The Manhattan Life Corporation a Delaware Corporation; The Manhattan Life Insurance Company, a wholly owned subsidiary of The Manhattan Life Corporation; Donald M. Fordyce. Chairman of the Board and Chief Executive Officer of The Manhattan Life Corp. and The Manhattan Life Insurance Company, individually and in his corporate capacities,

Appellees.

Appeal from the United States District Court for the District of Maryland at Baltimore. Edward S. Northrop, Senior District Judge. C/A N-82-3461.

Argued: January 9, 1985 Decided: March 20, 1985

Before Winter, Chief Judge, MURNAGHAN and PHILLIPS, Circuit

Robert A. Rohrbaugh (Wood & Rohrbaugh on brief) for Appellant; Sheila J. Carpenter (Steuart H. Thomsen; Sutherland, Asbill & Bremman; Andrew Corselli; Evan B. Giller on brief) for Appellees.

PER CURIAM:

Maynard N. London appeals from an order granting summary judgment in favor of the Manhattan Life Corporation, its wholly owned subsidiary, the Manhattan Life Insurance Company, and Donald M. Fordyce, chairman of the board and chief executive officer of both corporations.

London has alleged that Manhattan Life wrongfully appropriated his idea for a life insurance policy. The "idea" was to create incentives for individuals to maintain healthy lifestyles by allowing annual dividents to the insureds based on compliance with salient health factors. It was undisputed that London presented the concept he claimed had been appropriated, in confidence, to Fordyce in 1968. It also was undisputed that the 1968 meeting ended on an indefinite note, with no meeting of the minds. Later, in 1980, Manhattan

introduced a life insurance policy, focusing on a preferred risk market, which gives a low premium to individuals who meet particular health criteria. London now contends that Manhattan's plan was based on his original 1968 concept.

The district court, resolving all conflicting inferences and disputed facts in favor of London, found (1) that any similarity between defendants' life insurance plan and London's 1968 proposal was attributable to unoriginal ideas, and (2) that defendants developed the plan independently, in collaboration with another physician. There was evidence to support those findings.

We affirm on the opinion of the district court. Maynard N. London v. The Manhattan Life Corp., et. al., No. N 82-3461. (D. Md. February 6, 1984).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYNARD N. LONDON	:
	:
v.	:
	:Civil Action
THE MANHATTAN LIFE CORPORATION, et. al.	:No.: N 82-3461
	:
	:

MEMORANDUM

This action was brought by plaintiff, Maynard London, a Maryland resident, against defendants, The Manhattan Life Corporation, a Delaware Corporation, and one of its wholly owned subsidiaries also called the Manhattan Life Corporation, and its chief executive officer, Donald Fordyce. (All defendants are hereinafter collectively referred to as "Manhattan Life.") The jurisdiction of this Court is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. The complaint consists of two counts, the first of which is a claim for wrongful appropriation of an intellectual property; the second count is for breach of

contract. Presently, before the Court is a motion by defendants for summary judgment.

Although, the parties have not addressed the issue, this Court finds that Maryland law applies to this action. Since this is a diversity action, the conflicts of law rules of Maryland must be used to determine what law applies. Erie Railroad v. Thompkins, 304 U.S. 64 (1938); Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941). Maryland conflicts rules direct this Court to apply the law of the place of injury. President and Directors of Georgetown College v. Madden, 505 F. Supp. 557 (D.Md. 1980), aff'd in part and appeal dismissed, 660 F.2d 91 (4th Cir. 1981); Hauch v. Connor, 295 Md. 120 (1983). Since London developed his idea here and much of the correspondence concerning the meeting occurred in Baltimore, then it can be said that the injury occurred in Maryland. Incidentally, however, defendants have relied on various New York

authorities in their motion. As will become clear below, the result would not have been different had New York law been applied in this action.

The factual background of the case and the basic contentions of the parties are as follows. Sometime during 1961, plaintiff London conceived of and developed an idea for a new life insurance product. He called his idea the "Long Life and Good Health Plan." Plaintiff contends that this idea was unique and novel and that he disclosed it, in confidence, to Manhattan Life. It seems to be agreed among the parties that sometime in 1968, London met with officers and agents of Manhattan Life to discuss his idea with them. London states that at the meeting he presented representatives of Manhattan Life with an oral summary of his idea, and a written brochure marked "confidential." (Defendant's Exhibit 2; London deposition Exhibit 28) Defendants

apparently do not dispute this much of plaintiff's version of the facts.

London contends that after presenting the summary of his idea to the Manhattan Life officials, he discussed compensation with defendant Fordyce. London further contends that he was told that five percent of gross premiums was "an accepted practice" for the use of insurance ideas. London asserted in deposition and Interrogatories that the meeting ended in disagr-ement as to compensation and as to who would provide the actuarial work necessary for the plan. (London deposition at 72-76; Plaintiff's Answer to Interrogatory No. 1.) Defendants, on the other hand, apparently contend that the meeting ended with some expression by the Manhattan officials that they were not interested in the plan. Specifically, Mitchell Dezube, a former employee of Manhattan Life who was present at the meeting, recalls that he wrote a memorandum

after the meeting which indicated that the idea was economically impractical because it suggested that the company review the insured's annual physical examination. Dezube thought that this would be too costly to do for each policyholder every year. (Dezube affidavit, paragraph 7.) Thus, he recalls that the company was not interested in the plan.

With respect to the alleged use of London's idea, it is agreed among the parties that throughout the past five years, Manhattan Life developed and marketed a life insurance product known as Lifestyle 2000. Plaintiff's basic contention is that Lifestyle 2000 was derived from his plan and its use by Manhattan Life constitutes a misappropriation of the "Long Life and Good Health Plan." Defendants contended that Lifestyle 2000 was developed twelve years after plaintiff's disclosure of his

idea and that the policy was developed from the research of another individual, Dr. Kenneth H. Cooper.

The issue whether defendants used plaintiff's idea in the creation of the Lifestyle 2000 policy is the seminal issue in this summary judgment motion. As plaintiff points out in his opposition, the essential elements of the tort of misappropriation of an idea are: 1. that the idea was novel and concrete; 2. that the idea was disclosed in a confidential manner; and 3. that the idea was adopted and made use of by the defendants. Capital Films Corporation v. Charles Frils Productions, Inc., 628 F.2d 387, 394 (5th Cir. 1980). Here, there does not appear to be any dispute about the confidentiality of the disclosure. The parties have raised the issues of novelty and concreteness, but they have primarily focused on whether Manhattan

Life used plaintiff's idea. London contends that the similarities between the "Long Life and Good Health Plan" and Lifestyle 2000 are sufficient to present a jury question as to whether defendants used plaintiff's idea. Defendants, on the other hand, contend that there is sufficient, undisputed evidence that Lifestyle 2000 was developed independent of and without reliance upon London's proposal.

Of course, on motion for summary judgment, the movant has the burden of showing the absence of genuine issues as to any material fact, and for these purposes the material it lodges must be viewed in the light most favorable to the opposing party. Adickes v. Kress & Co., 398 U.S. 144, 157 (1970). The non-moving party must present evidence of any issue of material fact which only need be sufficient to require the trier of fact to resolve the

differing versions of the facts at trial. First National Bank v. Cities Services, 391 U.S. 253, 289 (1968). This Court must decide initially whether defendants have shaown that no genuine issue exists as to its use of plaintiff's idea. Thus, I will first discuss the general attributes of the "Long Life and Good Health Plan."

London's idea centers around the concept that certain factors, especially physical fitness, can result in increased longevity. He arrived at this thought when "President Kennedy called to the attention of the American people the need for physical fitness." (Defendants' Exhibit #1, p. 4). Working on the basic assumption that physically fit people live longer, plaintiff con-eived an insurance policy whereby a policyholder would have to meet certain criteria based upon the longevity factors in order to qualify for a special insurance policy. Under this special policy, the

holder would receive dividends if each year he or she actively undertook the "Long Life and Good Health Preventative Measures." (Defendants' Exhibit 2). As noted above, London's proposal did contemplate that the insurance company would annually evaluate each holder to determine what dividends that holder would deserve for that year.

Plaintiff states that his plan fundamentally had to do with self-preservation and, in turn, preservation of mankind. He further states in his resume of the plan that mental health played a major role and that people should not only participate in physical fitness programs, but also in "mental health activities." This, according to plaintiff, "would bring perspective and moderation into our work, love, rest, sleep, relaxation, exercise and eating." (Defendants' Exhibit 1, p. 4). Also important in the policyholder's program is a "belief in God." This factor, according to plaintiff, is the

"final word."

Having reviewed the general attributes of plaintiff's idea, I now turn to Manhattan Life's policy, Lifestyle 2000. Lifestyle 2000 is a "superselect" insurance policy which, taken in the light most favorable to plaintiff, does involve insurance benefits for especially healthy or physically fit people. Certain of the factors relied upon by Manhattan Life in determining which individuals qualify for Lifestyle 2000 are the same as those factors used in the "Long Life and Good Health Plan." Specifically, the factors used in Lifestyle 2000 are:

Family History
Physical Fitness
Blood Pressure
Pulse Rate
ECG
Weight
Non-Smoking
Cholesteral
Annual Physical Examination
Other Tests at Examination
High-density Lipo proteins

The factors taken into account in London's Long Life and Good Health Plan are as follows:

Vaccinations
Chest X-rays
Blood Tests
Weight Control
Discussion of a Balanced Diet
Discussion of Good Habits
Discussion of Good Housing Conditions
Discussion of General Acceptance of Preventative Program
First Aid
Heart Massage
Mouth-to-mouth Resuscitation
Discussion of Care Against Unnecessary Radiation Exposures
Dental Examinations
Eye Examinations
Courtous and Careful Driving
Mechanical Inspection of All Owned Vehicles
Seat Belts on all Owned Vehicles
Civil Defense
Exercise
Mental Health
Belief in God

It is true that a number of plaintiff's factors do appear on the Lifestyle 2000 list. However, plaintiff can hardly contend that he originated the idea that physically fit people live longer and healthier lives. In fact, plaintiff himself admits that President Kennedy came up with the idea before he did. This Court finds that on the whole, defendants are correct in their argument that whatever

minimal similarities that are present are attributable to unoriginal ideas.

Moreover, the original ideas in London's plan have not been picked up in Manhattan Life's policy. For instance, each item on plaintiff's list is something that the policy-holder should do each year. That is, the individual should engage in the various discussions and get the prescribed "shots" and undergo the tests mentioned. In Lifestyle 2000, on the other-hand, no such yearly preventative measures are presented; there is no emphasis on a continuous practice. In addition, plaintiff's policy focuses heavily on mental aspects of health and on spiritual and religious health. To the contrary, Lifestyle 2000 is quite secular and involves no mental health measures. In fact, the "stress" factor suggested by Dr. Cooper was dropped by Manhattan Life.

Furthermore, another difference is that plaintiff's idea involved paying dividends

each year depending upon the physical conditions and health habits of the insured for that year. In contrast, Lifestyle 2000 involves lower premiums which are fixed for the life of the policy. London argues that there is little difference between premiums and dividends except that the money is paid at different times. However, Lifestyle 2000 only gives the insured one chance to obtain lower premiums. When an application is filed, a determination is made whether the individual is "superfit;" if so, he or she qualifies for Lifestyle 2000 for the life of the policy and the premiums are thereby fixed.

From all of this, it is quite apparent that the similarities between plaintiff's idea and Lifestyle 2000 are not so overwhelming as to preclude summary judgment. To the contrary, the only real similarity is the general notion that physically fit people live longer.

Manhattan Life has presented essentially

undisputed evidence that Lifestyle 2000 was based upon Dr. Kenneth Cooper's plan outlined in Cooper's book, The Aerobics Way. This plan focused primarily on the coronary risk factor and focused on cardiovascular health. Cooper had suggested that people with lower coronary risk factors should qualify for lower premiums. Defendants have presented a plethora of depositions, answer to interrogatories, and affidavits in support of their argument that Manhattan Life independently arrived at Lifestyle 2000 based solely upon Dr. Cooper's idea. Plaintiff has in no way genuinely disputed this except to point out similarities between his idea and Lifestyle 2000 and to insinuate that Mr. Fordyce, president of Manhattan Life, encouraged the use of plaintiff's idea because he attended the meeting as a regional director and later became chief executive of the company. This is not sufficient to overcome the wealth of evidence presented by Manhattan Life to show

that it never used plaintiff's idea.

Where whatever minimal similarities that are present are attributable to unoriginal ideas, the defendant is entitled to summary judgment against a plaintiff claiming misappropriation of the idea. Ed Graham Productions, Inc. v. National Broadcasting Company, Inc., 347 N.Y.S. 2d 766, 768-69 (1973). In this case, defendants have shown as a matter of law that the only similarities between the Manhattan Life policy and plaintiff's idea were attributable to unoriginal ideas. Thus, defendants are entitled to judgment as a matter of law on the misappropriation count.

Moreover, it has been shown that no genuine dispute of material fact exists concerning whether defendants used plaintiff's idea. This point is the lynchpin of the case because if defendants never used the idea, not only is it true that they could not have misappropriated it, but further, there can be no breach of any contract

because no compensation would be due if plaintiff's ideas were not used. That is, taking the matter in the light most favorable to plaintiff and assuming arguendo that a contract for compensation was entered, no compensation would be due if plaintiff's work was never utilized by Manhattan Life. From the above analysis, and based upon the affidavits, depositions and answers to interrogatories submitted by defendants, this Court finds that no genuine issue of fact exists regarding whether Manhattan Life developed Lifestyle 2000 as a result of Dr. Cooper's research and independently of plaintiff's idea. This finding is fatal to plaintiff's case since there can be no liability where a defendant's product was developed independently of any disclosure by Plaintiff. Houser v. Snap-on Tools Corp., 202 F. Supp. 181, 186 (D.Md. 1962).

Accordingly, defendants are entitled to judgment as a matter of law on both counts of the complaint. A separate Order will be entered in accordance with this Memorandum Order.

February 6, 1984
Date

/s/
Edward S. Northrop
Senior United States
District Judge